

CLEAN WATER ACT (CWA) SECTION 404 ASSUMPTION RULEMAKING AND ACTIVITIES

BACKGROUND:

- Michigan and New Jersey are the only states that currently administer the Section 404 program. States and tribes have cited various reasons for not assuming the CWA Section 404 program including lack of dedicated federal funding, inconsistency between state and federal authorities, lack of partial assumption authority, and lack of clarity on which waters of the U.S. the Army Corps of Engineers (Corps) retains.
- The EPA established a Federal Advisory Committee Act (FACA) subcommittee in 2015 to provide recommendations on how the EPA could clarify which waters states and tribes may assume under CWA Section 404(g) for purposes of issuing dredged or fill permits. The recommendations were submitted to the Administrator in June 2017.
- In August 2018, the Assistant Secretary of the Army for Civil Works issued a memorandum to the Corps clarifying which waters states and tribes may assume.

KEY POINTS:

- Congress gave states and tribes the authority to assume the CWA Section 404 dredged and fill permitting program for certain waters within their state/tribal boundaries. Under Section 404(g), the EPA approves state and tribal requests to assume the program.
- The EPA has worked with various states and tribes who considered assumption in the past, but for various reasons chose not to pursue the program. We are now actively working with Florida, Indiana, Arizona, Oregon, Minnesota, Nebraska, and others who expressed interest in assuming the program.
- The EPA is also working with Florida and other states on addressing Endangered Species Act considerations in program assumption.
- In response to input from states and tribes, the Agency initiated a rulemaking to revise our 1988 regulations to clarify and modernize the regulations. In 2018, EPA conducted tribal consultation as well as pre-proposal input meetings and webinars with states and tribes. States and tribes then provided pre-proposal recommendations to EPA in early 2019.
- The EPA is currently developing options for the rulemaking.

TALKING POINTS:

- This Administration is taking action to better balance the responsibilities for protecting our environment between the federal government and states.
- The EPA has initiated a rulemaking to modernize our existing assumption regulations to reduce barriers for states and tribes to assume the Section 404 permitting program.
- We expect to issue a proposed rule in 2020.
- By empowering states and tribes to take on this permitting responsibility, we can achieve greater efficiencies in infrastructure and other permitting decisions while continuing to protect the environment.
- We are also actively working with states and tribes that have expressed an interest in assumption.